Supreme Court, U.S.
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No. 97-961

In The

Supreme Court of the United States

October Term, 1997

JAMES J. CONDIT, JR., et al.,

Petitioners,

v.

HAMILTON COUNTY, OHIO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Hamilton County Court Of Appeals First Appellate District

BRIEF OF RESPONDENTS CITY OF CINCINNATI, LAWRENCE E. WHALEN, DONALD HUDSON AND DANIEL CAIN IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether in an action brought under 42 U.S.C. Section 1983, where Petitioners fail to produce evidence of a policy or custom on the part of the municipality with respect to alleged civil rights violations, the municipality is entitled to judgment as a matter of law.

2. Whether in an action brought under 42 U.S.C. Section 1983, municipal Police Officers are entitled to qualified immunity when enforcing judicial orders.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT 3

1. The City of Cincinnati is entitled to absolute quasi-judicial immunity when enforcing a valid Court Order 3

2. Individual Police Officers are entitled to absolute quasi-judicial immunity when enforcing judicial orders 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Bachelier v. Hamilton County, No. C-1-89-607 (S.D. Ohio, July 26, 1990), *aff'd*, 931 F.2d 893 (6th Cir. 1991) 7

City of Canton v. Harris, 489 U.S. 378 (1989) 7, 8

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) 5

Davis v. Crush, 646 F.Supp. 1192 (S.D. Ohio 1986) 1

Doe v. McFaul, 599 F.Supp 1421 (1984).....3, 4

Fisher v. City of Cincinnati, 753 F.Supp. 681 (S.D. Ohio 1990) 5

Hays v. Jefferson County, 668 F.2d 869 (6th Cir. 1982), *cert. denied*, 459 U.S. 833 (1982)..... 6

Leatherman v. Tarrant County Narcotics Unit, 507 U.S. 163 (1993) 3, 9

McKee v. City of Rockwall, 877 F.2d 409 (5th Cir. 1989)..... 8

Monell v. Dep't of Social Services, 436 U.S. 658 (1978) 4, 6, 8

Oklahoma City v. Tuttle, 471 U.S. 808 (1985)....4, 6, 7, 8

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) 4

Planned Parenthood Ass'n of Cincinnati, Inc. v. Project Jericho, 52 Ohio St.3d 56 (1990) 1

Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434 (6th Cir. 1988)..... 9

Weber v. Village of Hanover Park, 768 F.Supp 630 (N.D. Ill. 1991) 9

STATEMENT OF THE CASE

On June 20, 1986, Hamilton County, Ohio Common Pleas Judge Thomas Crush, in the case of *Planned Parenthood Ass'n of Cincinnati, Inc. v. Project Jericho, et al.*; Case No. A-8602714, entered a Preliminary Injunction regulating picketing at the Planned Parenthood Clinic, 3332 Vine Street in Cincinnati, Ohio on June 28, 1986. (Pet. App. 15a). On June 27, 1986, Judge Crush issued an Order to the Sheriff of Hamilton County, Ohio, ordering him to enforce the injunction at the clinic. (Pet. App. 21a). This Order equally empowered the Cincinnati Police Department to enforce the injunction. On June 28, 1986, pursuant to the Court Order, numerous abortion protesters were arrested.

In the subsequent years, numerous legal actions were instituted by the abortion protestors. Several of the Plaintiffs unsuccessfully appealed their contempt convictions to the Supreme Court of Ohio. *Planned Parenthood Ass'n of Cincinnati, Inc. v. Project Jericho*, 52 Ohio St.3d 56 (1990). The Plaintiffs also sought to have Judge Crush disqualified due to bias and prejudice, but these allegations were found to be meritless. An attempt to have the case removed to Federal District Court also failed. *Davis v. Crush*, 646 F.Supp. 1192 (S.D.Ohio 1986).

Finally, on June 26, 1987, the Petitioners filed this action against eighteen Defendants, including the City of Cincinnati, the Chief of Police and two Cincinnati Police Officers. After several years of motions and procedural maneuvers, the parties filed for Summary Judgment in September, 1995. Subsequently, Judge Crush issued his Decision denying the Petitioners' Motion and granting

the respective Respondents' Motions for Summary Judgment. (Pet. App. 12a).

The Petitioners subsequently brought an appeal to the Hamilton County Court of Appeals First Appellate District of Ohio challenging the granting of summary judgment and requesting summary judgment on the merits. On February 26, 1997, the Court of Appeals affirmed the judgment of the trial court. (Pet. App. 6a).

Petitioners appealed to the Ohio Supreme Court. On June 18, 1997, the Ohio Supreme Court declined to accept jurisdiction of the case and dismissed the appeal as not involving any substantial constitutional question. (Pet. App. 5a). Petitioners moved for reconsideration which the Ohio Supreme Court denied on September 3, 1997. (Pet. App. 4a).

Factually, on June, 28, 1986, Cincinnati Police Officers Daniel Cain and Donald Hudson assisted Hamilton County, Ohio Sheriff's deputies in effecting the arrest of one of the Petitioners, Joseph Martin, in accordance with the June 20, 1986 Preliminary Injunction and June 27, 1986 Order to the Sheriff. The arrest of Joseph Martin was the only assistance the Cincinnati Police gave in the enforcement of the Injunction or the Order in relation to the abortion protestors. Petitioner Martin is the sole Petitioner bringing any claim against the City Respondents.

ARGUMENT

1. The City of Cincinnati is entitled to absolute quasi-judicial immunity when enforcing a valid Court Order.

Petitioner argues that the Court of Appeals erred in its decision by affirming summary judgment for the City on the grounds of quasi-judicial immunity. Petitioner argues that the Court of Appeals was wrong to grant immunity to the City as well as to the individual officers.

Petitioner cites dicta from *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163 (1993), for the proposition that absolute or qualified immunity afforded government officials is unavailable to municipal defendants. However, Petitioner misconstrues the meaning of this passage in the context of the surrounding decision. The *Leatherman* decision only held that a federal court may not apply a heightened pleading standard in civil rights cases alleging municipal liability under 42 U.S.C. Section 1983. Additionally, *Leatherman* did not address the issue presented here – whether a municipality can claim quasi-judicial immunity when its officers are sued for enforcing a valid injunction and order.

As it is clear that the officers are immune from Section 1983 liability, so too are the City and Chief Whalen. For example, in *Doe v. McFaul*, 599 F.Supp 1421 (1984), having found that the sheriff, jail personnel and other individuals responsible for implementing the judicial orders were immune, the District Court concluded:

> It follows logically that the remaining defendants – the County, the Commissioners, and Judge Spellacy – cannot be subject to liability for

> their failure to overrule, countermand, challenge, or otherwise interfere with Judge Harris' facially valid order. Plaintiffs point to no case law supporting the proposition that a state official violates the Constitution or civil rights statutes by failing to attack a state court judgment.

Id. at 1432.

In the instant case, Officers Cain and Hudson were present at the Planned Parenthood Clinic pursuant to the Court Order. Consequently, the officers, acting to enforce a valid order, which has been upheld by the Ohio Supreme Court as a valid time, place and manner restriction, are entitled to absolute immunity, and logically, the City and the Chief of Police, are similarly entitled to absolute immunity.

Additionally, Petitioner is unable as a matter of law to establish the requisite elements for liability under 42 U.S.C. Section 1983 for both the City and the individual Defendants. In *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978), this Court held that municipalities may be liable for constitutional injuries caused only by an official policy or custom. In *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), this Court held that a single act by a low level official was an insufficient basis to infer the existence of a municipal policy. In so holding, this Court indicated that *Monell* intended to prevent municipal liability except in situations where a claimed wrong could be attributed to municipal decision makers. *Id.* at 823-824. Thereafter, in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), this Court held that municipal liablility attaches only where a deliberate choice to follow a course of action is made

from among various alternatives by the official responsible for establishing final policy. In *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), this Court considered the issue of identifying municipal policy makers for purposes of Section 1983 liability. This Court held that the identification of the person with the authority to make final policy is a question of state or local law and not a question for the jury. *Id.* at 124-125.

In determining the policy maker for the City of Cincinnati Police Division, it is necessary to look at the City Charter and the Administrative Code. *Fisher v. City of Cincinnati*, 753 F.Supp. 681 (S.D. Ohio 1990), is instructive. In that case, a plaintiff sued, among others, the City of Cincinnati, the Police Chief and other officers under Section 1983. *Id.* at 689. The District Court, analyzing the Supreme Court cases cited above herein, identified who has "final" policy making authority in the City of Cincinnati Police Division stating:

> [Police Chief] Whalen . . . though charged with supervising and executing the City's policies or customs, do[es] not possess the authority to make "final" policy as defined in *Praprotnik*.

Id. at 689. Rather, as the City Charter and the Administrative Code make patently clear, final policy making authority in the Police Division rests with the City Manager and City Council. *Id.* at 689.

In Petitioner's Complaint, however, there was no mention of the City Manager or the City Council. Without an allegation that the individuals who have final policy making authority were involved in the alleged unconstitutional policy, liability cannot attach under Section

1983. Also, liability attaches "only where there is essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that police misconduct is almost inevitable . . . or would be properly characterized as substantially certain to result." *Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir. 1982), *cert. denied*, 459 U.S. 833 (1982). Instead of imposing liability based on respondeat superior or negligence, which is unquestionably improper under *Monell* and its progeny, in order to impose liability on the municipality based on inadequate training or supervision, "[t]he courts look for some proof that a defendant has a culpable state of mind – that the action or failure to act was to some degree deliberate rather than inadvertent." *Id.* at 873. It is obvious that the Second Amended Complaint did not allege such facts as to show this conduct on behalf of the municipal policy maker when the Complaint did not even allege that the individuals who have final policy making authority, the City Manager and the City Council, were involved in any way in the policy.

Additionally, the Complaint does not assert that the so called policy of insufficient training and supervision was in any way the "moving force" of the constitutional deprivation. *Monell*, 436 U.S. at 694; and *Tuttle*, 471 U.S. at 823, n.7. This Court addressed the issue of whether an allegation of inadequate supervision and training was the moving force behind alleged Section 1983 violations. *Id.* at 823, n.7. This Court made it clear that merely alleging inadequate supervision and training will not suffice to impose Section 1983 liability; rather, the plaintiff must prove, among other things, that the inadequate training caused the plaintiff's injuries. *Id.* at 823, n.7.

If anything was a "moving force" in this case, it was the Court Order which put Officers Hudson and Cain at the scene, not some nonexistent policy of inadequate training and supervision. In this regard, *Bachelier v. Hamilton County*, No. C-1-89-607 (S.D. Ohio, July 26, 1990), *aff'd*, 931 F.2d 893 (6th Cir. 1991), is dispositive. In *Bachelier*, the District Court held that some of the abortion protestors who were arrested for violating the court order could not succeed on their Section 1983 claims, *inter alia*, because under *Monell* and its progeny, the enforcement of the facially valid court order was not the moving force of any of the alleged constitutional violations. The District Court reasoned:

> Judge Crush is a state official rather than a policy-maker for the city or county, [citation omitted], and therefore, any policy adopted by Judge Crush through his injunction cannot form the basis for liability of the City and County.

Id. at 893.

In addition, this Court has consistently stated that a single incident, without a supporting history, is inadequate to infer a municipal policy. *See, e.g., City of Canton v. Harris*, 489 U.S. 378 (1989); and *Tuttle*, 471 U.S. at 820. Clearly, Officers Cain's and Hudson's actions, in assisting Hamilton County Sheriff's deputies in the arrest of Petitioner Martin, constituted such a "single incident." In *Tuttle*, this Court refused to allow Section 1983 liability on the theory that a municipal police force's "policy" of training and supervising was the "policy" that resulted in inadequate training, and therefore, the constitutional violations alleged. *Id.* at 820. This theory, very similar to the

theory relied upon by Martin in his Complaint, is especially improper when an inference of such a policy is allowed by the mere existence of a single incident. *Id.* at 820-821. The lower federal courts have applied this rule on many occasions to claims that allegedly wrongful acts by police officers can form the basis of a municipal policy sufficient for Section 1983 liability. *See, e.g., McKee v. City of Rockwall,* 877 F.2d 409, 415-416 (5th Cir. 1989).

Martin cannot offer this Court a scintilla of evidence that City officials deliberately chose a training program alleging specific facts which would support the allegations in the Complaint. *See Monell,* 436 U.S. at 691-694. In this regard, this Court's analysis in *Tuttle* is persuasive. This Court, in dismissing the plaintiff's claim that the " 'policy', of 'inadequate training' " was the cause of her husband's death from a police shooting, stated:

> [I]t is therefore difficult in one sense even to accept the submission that someone pursues a 'policy' of 'inadequate training,' unless evidence be adduced which proves that the inadequacies resulted from conscious choice – that is, proof that the policymakers deliberately chose a training program which would prove inadequate.

Tuttle, 471 U.S. at 823.

Petitioner cannot simply rely on broad and conclusory allegations in the Complaint. As this Court has held, in order to be actionable, the failure to train must amount "to deliberate indifference to the rights of persons with whom the police come into contact." *Harris,* 489 U.S. at 389.

Instructive are some cases relying upon *Harris* which set forth the proper pleading requirements imposed on plaintiffs seeking to establish inadequate training and supervision liability. *See Weber v. Village of Hanover Park*, 768 F.Supp. 630 (N.D. Ill. 1991), and cases cited therein. In *Weber*, the court granted the defendant's motion to dismiss the plaintiffs' Section 1983 claim, reasoning that although the plaintiffs had "pleaded the 'catch words' from *Harris* – 'failure to properly train' and deliberate indifference' – they have failed to support these conclusory, boilerplate allegations with any facts about the Village's training program or how that training program caused their injuries." *Id.* at 640. Similarly in this case, Petitioner has not raised any facts which would establish an inadequate training program or that such a program was the cause of his injuries. Because Officers Hudson and Cain were acting pursuant to the Court Order, they are obviously not liable for the alleged non-physical injuries.

Since the Complaint omitted facts which were crucial to recovery, an assumption that those facts do not exist is reasonable. *See Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434 (6th Cir. 1988), where the court stated, "when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist." *Id.* at 437. This is not to say that Respondents suggest Petitioner must meet a heightened pleading standard as prohibited by *Leatherman*, 507 U.S. at 163. Instead, as indicated by this Court's recent cases on municipal liability, courts must rely on summary judgment and control of discovery to weed out unmeritorious Section 1983 claims against municipalities. *Id.* at 166.

The legal basis of Petitioner's claim is clearly without merit. Because the law is so clearly against Martin's claims, and because Petitioner has failed to establish any material fact which would entitle him to a trial on the merits, judgment was properly granted to Respondents as a matter of law.

2. Individual Police Officers are entitled to absolute quasi-judicial immunity when enforcing judicial orders.

Petitioners again mischaracterize the actions of the Police Officers and Sheriff's deputies in enforcing Judge Crush's Order. The Sheriff [and officers] did not as Petitioners would suggest "completely subjugate himself and his deputies to the discretion of Planned Parenthood, using no independent judgment." (Petition, p. 16).

The Court of Appeals noted that Petitioners had not presented sufficient evidence that Respondents acted beyond the judge's order. The officers in this case did not "recklessly [abandon] and [violate] the Court's directive, and [devise their] own methods to accommodate one party to a civil dispute, to the detriment of innocent victims," (Petition, p. 17), but were merely diligent public servants thrust into a hotly contested and ideologically-driven lawsuit to enforce a valid judicial order.

Officers Cain and Hudson were present at the Planned Parenthood Clinic pursuant to a valid Court Order subsequently upheld by the Ohio Supreme Court.

They are therefore entitled to absolute quasi-judicial immunity in enforcing the order.

CONCLUSION

For the foregoing reasons, Respondents City of Cincinnati, Lawrence E. Whalen, Donald Hudson and Daniel Cain request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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